UNITED STATES COURT OF APPEALS
FOR DISTRICT OF COLUMBIA CIRCUIT
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BRIEF FOR APPELLEE

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 06-5242

NATIONAL INSTITUTE OF MILITARY JUSTICE, **Appellant,**

v.

U.S. DEPARTMENT OF DEFENSE, **Appellee.**

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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C.A. No. 04-00312 (RBW)

CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

I. Parties

Appellant, plaintiff below, is the National Institute of Military Justice. Appellee, defendant below, is the United States Department of Defense.

There were no amici curiae in the lower court. There is one in this Court, *i.e.*, The Constitution Project.

II. Ruling Under Review.

The rulings at issue in this appeal are the Order of the Honorable Reggie B. Walton, dated December 16, 2005, and accompanying Memorandum Opinion, and the Order of June 12, 2006. The District Court's Memorandum Opinion is published at 404 F.Supp.2d 325 (D.D.C. 2005). These orders granted Appellee's Motions for Summary Judgment on the merits of the FOIA Exemption 5 argument and dismissed the case.

III. Related Cases.

This case has not previously been before this Court and counsel for Appellee is aware of no other related cases.

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TABLE OF AUTHORITIES[1]

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*Authorities upon which Appellee chiefly rely are marked with asterisks.

STATUTES AND REGULATIONS

OTHER AUTHORITIES

GLOSSARY

DFOISR	Directorate for Freedom of Information and Security Review
DoD	Department of Defense
FOIA	The Freedom of Information Act
NIMJ	National Institute of Military Justice

ISSUES PRESENTED

In the opinion of Appellee, the following issue is presented:

Whether the District Court properly determined that communications between DoD employees and unpaid non-agency attorney consultants, whose input was sought by DoD during the development of procedures governing the establishment of military commissions to try suspected terrorists, were properly withheld pursuant to FOIA Exemption 5 U.S.C. § 552(b)(5), as "inter-agency or intra-agency memorandums or letters."

RELEVANT STATUTES AND REGULATIONS

The relevant statute and regulations are attached as an Addendum to this brief.

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BRIEF FOR APPELLEE

STATEMENT OF JURISDICTION

Appellant asserted jurisdiction in the District Court pursuant to the Freedom of Information Act, 5 U.S.C. § 552(a)(4)(B). This Court has jurisdiction under 28 U.S.C. § 1291.

COUNTERSTATEMENT OF THE CASE

On October 3, 2003, Appellant, National Institute of Military Justice, a nonprofit corporation that provides information to the public about military justice, made a FOIA request for records held by the Appellee, Department of Defense (DoD). R. 1 (Complaint) at ¶ 3, ¶5, JA 1-2; see also R. 52, Memorandum Opinion, dated December 16, 2005 (Mem.Op.) at p. 2; JA 124. The request sought "all written or electronic communications that the Department (including the Secretary and General Counsel) has either sent to or received from anyone (other than an officer or employee of the United States acting in the course of his or her official duties) regarding the President's November 13, 2001 Military Order, the Secretary's Military Commission Orders, and

the Military Commission Instructions. . ." Id. In response to Appellant's request, Appellee released more than a thousand pages of documents. R. 38, Att. 1 at ¶¶ 5, 7, 9 &10; JA 77-80.

Appellant challenges the District Court's decision on cross motions for summary judgment that determined that Appellee properly applied FOIA Exemption (b)(5) to communications between DoD employees and certain non-agency attorneys who were former high level officials in the Federal Government or experts in areas of particular interest. DoD had sought out the views of these attorneys because of their particular expertise. Although they were unpaid, DoD considered them consultants to the agency. They provided advice in connection with the formulation of the military procedures and instructions under which the Military Commissions were developed with the assurance that such advice would not be revealed to the public. Based on detailed declarations explaining their role and a review of the case law, the District Court determined that the communications between these individuals and DoD employees were properly protected under FOIA Exemption (b)(5). The District Court's decision was, thus, supported by the record.

Factual and Procedural History

Appellant, National Institute of Military Justice (NIMJ), filed a FOIA request with the Department of Defense by letter dated October 3, 2003, directed to the Directorate for Freedom of Information and Security Review (DFOISR). See R. 1 at ¶ 5, JA 2; see also R. 38, Att. 1 (Declaration of Christine S. Ricci, Associate Deputy General Counsel (Legal Counsel), DoD (Ricci Decl.) at ¶ 4; JA 77.[1] In its FOIA request, Appellant sought:

> all written or electronic communications that the Department (including the Secretary and General Counsel) has either sent to or received from anyone (other than an officer or an employee of the United States acting in the course of his or her official duties) regarding

[1] Although the Ricci Declaration is found at R. 38, the attachments referred to in the declaration are found at R. 36, including the *Vaughn Index* relevant here. See JA 4-69.

> the President's November 13, 2001 Military Order, the Secretary's Military Commission Orders, and the Military Commission Instructions. This request includes but is not limited to suggestions or comments on potential, proposed or actual terms of any of those Orders or Instructions and any similar, subsequent superseding or related Orders or Instructions, whether proposed or adopted.

Id. This request refers to the Defense Department Orders and Instructions drafted to implement the President's Military Order, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism" issued in November, 2001. Id.[2]

When the FOIA request was received, DFOISR made an initial determination that two offices within the Office of the Secretary of Defense were likely to have responsive documents. Id. These offices were: (1) the Correspondence and Directives Division of a support organization, Washington Headquarters Services, and (2) the Office of the General Counsel. Id.

The search of the Correspondence and Directives Division produced nine pages of responsive documents. Id. at ¶ 5; JA 77-78. These were released in their entirety to Appellant with an interim response by letter dated November 18, 2003. Id.

With respect to records in the Office of the General Counsel, an initial search was directed of the Office of Military Commissions, the Office of Deputy General Counsel (Legal Counsel), and other offices. Id. at ¶ 6; JA 78-79.

One hundred and ninety-one (191) pages of documents were located that could be released in their entirety. Id. at ¶ 7; JA 79. Additional documents were released with only redactions made for personal information and two documents were exempt in their entirety. Id. DFOISR released a

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[2] As the District Court pointed out, Appellant sought these records after the Secretary published the final rules establishing the procedures for conducting the military commissions in the Federal Register on July 1, 2003. R. 52, Mem.Op. at p. 2; JA 124. Appellant sought comments and advice received by DoD officials from non-agency attorneys and others not employed by the United States and the general public relating to the draft regulations. Id.

copy of the non-exempt documents to the Appellant on June 4, 2004. Id.

Appellant appealed what it identified as the "effective partial denial." Id. at ¶ 8; JA 79. After initial briefing, a new search was directed of the files of the Office of Deputy General Counsel (Legal Counsel), the correspondence files of the General Counsel, the files of the Deputy Secretary of Defense, the files of the Under Secretary of Defense for Policy, the files of the Office of Detainee Affairs, and the files of the Office of Public Inquiries and Analysis (PIA). Id. at ¶ 9; JA 79.

Different search criteria were applied in the second search, which resulted in the discovery of over 1000 pages of potentially responsive documents in the files of Legal Counsel. Id.; JA 80. In addition, efforts were made to locate all responsive records by contacting former employees who may have had knowledge regarding the record keeping process. Id. As a result of these efforts, another 1000 pages of documents were located in the files of an attorney who formerly worked in the Office of Military Commissions but had transferred to another office. JA 80. No responsive documents were found in the files of any of the other offices. Id.

Additional documents were released to Appellant in the following increments: The first supplemental increment consisted of 290 pages released through DFOISR on December 9, 2004; only personal information was redacted. Ricci Decl. at ¶ 10; JA 80. A second supplemental increment consisted of 477 pages released through DFOISR on December 14, 2004; only personal information was redacted. Id. A third supplemental increment consisting of 209 pages was made by DFOISR on December 30, 2004; only personal information was redacted. Id. A fourth supplemental increment consisting of 5 pages was made by DFOISR on January 4, 2005; no redactions were made. Id. A fifth supplemental increment consisting of 126 pages was made by

DFOISR on February 18, 2005; deliberative process and personal information was redacted. Id. As noted by Ms. Ricci:

> Documents relating to [appellant's] request were reviewed to achieve maximum disclosure consistent with the provisions of the FOIA and the Privacy Act. No reasonably segregable, non-exempt portions were withheld from the [Appellant]. In the interest of being as forthright and responsive as possible, some non-responsive information have been released.

Id. at ¶ 10; JA 80-81.

Overall, Appellee withheld information under FOIA Exemptions 3, 5 and 6, including eighty-five (85) documents withheld from disclosure in full pursuant to Exemptions 3 or 5, as more fully set forth in the Ricci Declaration and *Vaughn Index*. R. 38, Att. 1, and R.36, Exh. 11, respectively; JA 81 and JA 4-69.

Litigation began on February 26, 2004. Complaint at R. 1; JA 1. On September 30, 2004, DoD filed a motion for summary judgment [R. 18] and NIMJ cross moved for summary judgment. R. 22. Because additional documents were located after the filing of cross motions, DoD moved to file a new dispostive motion, to which NIMJ consented. R. 33. New cross motions were filed on March 9, 2005 [R. 36], and May 31, 2005 [R. 41]. Appellant did not contest Appellee's withholdings under Exemption 6. By Memorandum Opinion and Order of December 16, 2005, and Order of June 12, 2006, the District Court upheld Appellee's withholdings under Exemptions 3 and 5. R. 51, 52 & 60; JA 121-162. This appeal followed.

In this appeal, Appellant challenges only the withholding of 19 records, *i.e.,* "written communications between government employees and [non-agency attorney consultants who it characterizes as] members of the public relating to the establishment of military commissions to try suspected terrorists," pursuant to Exemption (b)(5)'s deliberative process privilege. See Brief of

Appellant at Appellant's Statement of Issues, Brief of Appellant at p. 1; see also p. 5-6. Draft correspondence or internal communications within or among any government departments, agencies, or personnel were excluded from the request. Brief of Appellant at p. 4.

The 19 documents at issue reflect communications between DoD officials and the following non-agency attorney consultants: Terrence O'Donnell, Professor Ruth Wedgwood, William Coleman, Lloyd Cutler, William Webster, Martin Hoffman, Bernard Meltzer, Jack Goldsmith, Newton Minow, Joseph Tompkins, and Geoffrey Hazard. See Id. at pp. 5-6; R. 36, Ex. 11, JA 6-8, 14- 15, 17-22, 23-28. As the record reflects, these individuals were non-agency attorneys whose advice was sought by the General Counsel in connection with the implementation of the Executive Order relating to the military commissions. See R. 36 at Ex. 12; R. 38, Att.1 at ¶¶ 12-17, & R. 45, Attachment 4; JA 72-73, 82-88, 115.

Specifically, the Declaration of Paul W. Cobb, Jr., former Deputy General Counsel (Legal Counsel) of DoD (Cobb Decl.) explains:

> The General Counsel asked several distinguished advisors and former high ranking government officials to consult with him and other senior attorneys and officials of the Department, including me, on matters relating to Military Commissions. This was not a formal group, it did not conduct meetings on any regular basis, and the individuals who participated in it did not provide any recommendations collectively, only individually. The list of individuals consulted changed from time to time, and most of the consultations were oral in the form of discussions with me and other personnel in the Department. The consultations were provided in confidence to the Defense Department, and there was an understanding that the contents of the consultations would not be released publicly. The subject of these consultations included the Orders and Instructions for implementation of the President's Military Order, and other subjects related to Military Commissions as well. For some discussions, notes were taken and transcribed–in other cases no record was made. I am aware of one meeting with the Deputy Secretary of Defense on the subject of Military Commission Orders and Instructions for which notes summarizing the discussion were prepared.

Cobb Decl., R. 36, Ex. 12 at ¶ 6; JA 72-73. At the time, Mr. Cobb was the Deputy General

Counsel who took the leadership role in the implementation of the President's Military Order. Id. at ¶ 4, JA 71-72. In that capacity, Mr. Cobb assembled staff, performed administrative duties and maintained the files on the Military Commissions. Id. at ¶¶ 4 and 5; JA 71-72. He worked closely with the General Counsel of DoD and other senior members of the DoD leadership on matters of particular sensitivity to the DoD. Id. at ¶ 1; JA 70. As he further explains the process:

> A few written comments were received from individual lawyers who had been asked by the General Counsel to provide confidential legal views on matters of concern to the Department . . . Many more comments came from members of the public or organizations with an interest in these matters. . . Some of these comments were solicited; many were not. . .

Id. at ¶ 7; JA 73.

In addition, Karen Hecker, Associate Deputy General Counsel (Legal Counsel) of DoD (Hecker Decl.), also provided a sworn declaration and states therein that:

> [t]he General Counsel of the Department of Defense sought the opinions and recommendations of several distinguished advisors and former high ranking government officials on a continuing basis and with the understanding and expectation that their comments would be kept in confidence. One of the areas they were consulted on was military commissions. They are consulted as individuals, although they may occasionally meet to give their individual opinions on a specific topic. The General Counsel's intent has been to maintain a relationship with these lawyers to benefit from their extensive experience and wisdom. They are not paid for their services but there is an understanding that they will consult and advise on a continuing basis on a variety of topics. In responding to the FOIA request by the plaintiff, the DoD withheld from release the opinions, analysis and recommendations of these individuals regarding proposed military commission procedures, including summaries and descriptions of their opinions included in various documents. As noted in the Declaration of Paul Cobb, these communications and consultations were provided in confidence to the DoD. The public disclosure of these materials would discourage the frank, open discussions on these issues by these individuals.

Hecker Decl., R. 45, Att. 4 at ¶ 4; JA 115. Ms. Hecker notes that DoD withheld the communications between these non-agency attorneys and DoD officials when it responded to

Appellant's FOIA request pursuant to Exemption (b)(5), because they reflected the opinions, analysis and recommendations of these individuals regarding proposed military commission procedures. Id. DoD determined that "[t]he public disclosure of these materials would discourage the frank, open discussions on these issues by these individuals" who were considered consultants. Id.[3]

In the declaration that accompanied the *Vaughn Index*, Ms. Christine Ricci, then Associate Deputy General Counsel (Legal Counsel) in the Office of the General Counsel, DoD, also explains the relationship of those non-agency consultants to DoD and their role in the deliberative process:

> DoD sought the opinions and recommendations of these outside consultants because their previous experience in the government and/or their expertise made them uniquely qualified to provide advice to the General Counsel's office on the Military Commissions procedures. Each was asked to provide their comments on the proposed Military Commission procedures. This advice played an integral function in DoD's decision making process. . .

Ricci Decl., R. 38 at ¶13; JA 84 (the *Vaughn Index* appears at R. 36; JA 4-69).

In the portion of the December 16, 2005, District Court's Memorandum Opinion addressing the Exemption (b)(5) withholdings, the court determined that the communications of these non-agency attorneys contained deliberative process privileged information. The court credited the DoD declarations and found that the withheld records expressed the views and opinions of DoD officials, attorneys, and consultants, including non-agency attorneys, in connection with the promulgation of the military commission regulations. R. 52 at 25; JA 145-151. The District Court agreed that the withheld documents containing the views of non-agency

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[3]Appellant does not challenge the pre-decisional deliberative nature of these documents. It challenges their status "as intra-agency memorandums or letters" between government employees and these unpaid attorney consultants. See Appellant's Issue Presented for Review, Appellant's Brief at p. 1.

attorneys were properly treated as "intra-agency or inter-agency" documents and that these records "fall squarely within the scope of" Exemption (b)(5)" relying on Dep't of the Interior v. Klamath Water Users Protective Ass'n, 532 U.S. 1, 10-11 (2001); Public Citizen, Inc. v. Dep't of Justice, 111 F.3d 168 (D.C. Cir. 1997); and, Ryan v. Dep't of Justice, 617 F.2d 781 (D.C. Cir. 1980). R.52, Mem.Op. at p. 26-27; JA 148-149. The District Court reasoned:

> While a consultant need not 'be devoid of a definite point of view when the agency contracts for its services,' Klamath, 532 U.S. at 10, for his views to be covered by Exemption 5, the consultant should not be representing an interest of his own, or that of any client, when he or she is advising the agency. Id. at 10-11. Thus, as the Klamath Court noted, when a consultant has no interest to advance, his only obligation is 'to truth and its sense of what good judgment calls for, and in those respects the consultant functions just as an employee would be expected to do.' Id. at 11.

Id. at p. 27; JA 149. The District Court also noted that there was no evidence that any of the non-agency attorneys were representing their personal interests or the interests of any clients in making their comments. "Rather, the comments were clearly made to advance the 'truth and [the consultant's] sense of what good judgment calls for, and in those respects [the consultant] functions just as an employee would be expected to do.'" Id. at p. 28; JA 150 (*quoting* Klamath, 532 U.S. at 11); see also R. 38 (Ricci Decl.) at ¶¶ 12-17; JA 82-88. In its appeal, Appellant does not suggest otherwise.

SUMMARY OF ARGUMENT

Summary Judgment for Appellee was warranted in this Freedom of Information Act case because Appellee complied fully with the requirements of that statute. Information was appropriately withheld under FOIA Exemption (b)(5), as attested to by detailed agency declarations and *Vaughn Index*. Detailed declarations of agency personnel establish that a group of non-agency attorneys were sought out by the General Counsel of DoD as consultants due to their expertise and

were asked to provide input during the deliberative process to implement the President's November 13, 2001, Military Order, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism." Because these individuals served as non-agency attorney consultants to DoD during this process, communications reflecting their views, comments, opinions were properly withheld under Exemption 5. Because this determination was plainly correct, the District Court's decision should be affirmed.

ARGUMENT

I. Standard of Review

This Court reviews the District Court's grant of summary judgment concerning the merits of the case *de novo*. Assassination Archives and Research Ctr. v. CIA, 334 F.3d 55, 57 (D.C. Cir. 2003); Johnson v. Executive Office for United States Attorneys, 310 F.3d 771, 774 (D.C. Cir. 2002); Gilvin v. Fire, 259 F 3d 749, 756 (D.C. Cir. 2001).

II. The Freedom of Information Act Provides a Vehicle for Public Access to Governmental Information Subject to Certain Exemptions.

"'Public access to government documents' is the 'fundamental principle' that animates FOIA." Center for National Security Studies, et al. v. U.S. Dep't of Justice, 331 F.3d 918, 925 (D.C. Cir. 2003)(*quoting* John Doe Agency v. John Doe Corp., 493 U.S. 146, 151 (1989)). Congress has "'recognized, however, that public disclosure is not always in the public interest.'" Id. (*quoting* CIA v. Sims, 471 U.S. 159, 166-67 (1985)). Public disclosure of government documents is necessary unless the requested information falls within one of nine enumerated exemptions. Id. (citations omitted). Although these exemptions must be "'narrowly construed,'" courts must not fail to give them "'a meaningful reach and application.'" Id. (citations omitted). It is the government's burden to prove that the withheld information falls within the exemptions it

invokes. Id. (*citing* 5 U.S.C. § 552(a)(4)(B)). DoD must demonstrate that the documents requested here were exempt from disclosure. See Assassination Archives and Research Ctr., 334 F.3d at 57. To accomplish this, DoD provided declarations that have "reasonably specific detail, demonstrate that the information withheld logically falls within the claimed exemption, and are not controverted by either contrary evidence in the record nor by evidence of agency bad faith." Mem.Op. at p. 5 (*quoting* Military Audit Project v. Casey, 656 F.2d 724, 738 (D.C. Cir. 1981)); JA 127.

III. The Documents at Issue in this Case Were Properly Withheld by DoD under the Freedom of Information Act Exemption 5.

A. The Scope of Exemption 5.

FOIA Exemption 5 protects "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). This exempts documents that would not ordinarily be available to an agency's opponent in civil discovery and incorporates all evidentiary privileges that would be available in discovery. See United States v. Weber Aircraft Corp., 465 U.S. 792, 799 (1984); FTC v. Grolier, Inc., 462 U.S. 19, 26 (1983); Martin v. Office of Special Counsel, Merit Systems Protection Board, 819 F.2d 1181 (D.C. Cir. 1987). Exemption 5 protects from disclosure documents that "fall within the ambit of a privilege" such that they would not be "routinely or normally" disclosed in civil discovery. Klamath, 532 U.S. at 8.

The deliberative process privilege is incorporated into FOIA Exemption 5. NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 151 (1975). This privilege protects the "quality of agency decisions." Id. The content or nature of the document is the focus of the inquiry into the privilege as opposed to the manner in which the exemption is raised in a particular situation. See Dow Jones

& Co., Inc. v. Dep't of Justice, 917 F.2d 571, 575 (D.C. Cir. 1990). The policy underlying this privilege is to encourage open, frank discussions of policy matters between government employees, consultants and other officials, to protect against premature disclosure of proposed policies before they become final, and to protect against public confusion by disclosing reasons and rationales that were not in fact the ultimate grounds for the agency's action. See, e.g., Russell v. Dep't of the Air Force, 682 F.2d 1045, 1048 (D.C. Cir. 1982); Coastal States Gas Corp. v. Dep't of Energy, 617 F.2d 854, 866 (D.C. Cir. 1980); Jordan v. United States Dep't of Justice, 591 F.2d 753, 772-73 (D.C. Cir. 1978) (en banc), overruled in part on other grounds; Crooker v. Bureau of Alcohol, Tobacco & Firearms, 670 F.2d 1051 (D.C. Cir. 1981) (en banc).

In order for a record to be protected by the deliberative process privilege, it must be: (1) an inter-agency or intra-agency document, and (2) pre-decisional and deliberative. See Klamath , 532 U.S. at 8-9. The sole issue before this Court is whether DoD properly withheld certain documents pursuant to the first prong of this test, *i.e.*, the "inter-agency or intra-agency" requirement. See Brief of Appellant, p. 1 (Issue Presented for Review).

Within the scope of Exemption 5 protections for "inter-agency or intra-agency" documents are communications from and with outside consultants in formulating policy. See Tigue v. U.S. Dep't of Justice, 312 F.3d 70, 77 (2d Cir. 2002), cert denied, 538 U.S. 1056 (2003). In fact, "nothing turns on the point that . . . reports were prepared by outside consultants . . . rather than agency staff." Id. (*quoting* Lead Indus. Ass'n, Inc. v. Occupational Safety and Health Adm., 610 F.2d 70, 83 (2d Cir. 1979) (*citing* Soucie v. David, 448 F.2d 1067, 1078, n. 44 (D.C. Cir. 1971)). "'When an agency record is submitted by outside consultants as part of the deliberative process, and it was solicited by the agency, [this Circuit] find[s] it entirely reasonable to deem the resulting

document to be an 'intra-agency' memorandum for purposes of determining the applicability of Exemption 5." Judicial Watch, Inc., v. Dep't of Energy, 412 F.3d 125, 130 (D.C. Cir. 2005) (*citing* Ryan v. Dep't of Justice, 617 F.2d 781, 790 (D.C. Cir. 1980) ("as long as the documents are created for the purpose of aiding the agency's deliberative process. . . they will be deemed intra-agency documents even when created by non-agency personnel . . ." *citing* Dow Jones & Co. v. Dep't of Justice, 917 F.2d at 575)) see also Formaldehyde Institute v. Dep't of Health and Human Svcs., 889 F.2d 1118, 1122 (D.C. Cir. 1989) (it is "irrelevant" whether the author of the documents is "a regular agency employee or a temporary consultant.").

In Dep't of the Interior v. Klamath Water Users Protective Ass'n , the Supreme Court discussed Exemption 5 in connection with the "intra-agency" nature of communications between a government agency, the Bureau of Indian Affairs, and an outside party (certain Indian tribes). In rejecting the argument that documents submitted by Indian tribes, which expressed the tribes' own interests, *i.e.*, their positions on a water allocation project, were "intra-agency" documents and entitled to Exemption 5 protection, the Court distinguished the tribes from "consultants," whose views are protected, noting that consultants typically have no interests to promote. The Court observed that consultants:

> have not been communicating with the Government in their own interest or on behalf of any person or group whose interests might be affected by the Government action addressed by the consultant. In that regard, consultants may be enough like the agency's own personnel to justify calling their communications "intra-agency."

Klamath, 532 U.S. at 12; see also Tigue v. U.S. Dep't of Justice, 512 F.3d at 78, n. 2. Significantly, Appellant in the instant case does not argue that the non-attorney consultants had their own interests to promote, like the tribes in Klamath.

Moreover, as noted by Appellant, "[t]he Klamath Court found no need to hold categorically that communications from private parties always fall outside the protection of Exemption 5, determining that even if there might possibly be some communications from private parties that would be protected from disclosure under Exemption 5, the Tribe's[sic] self-interested communications were not." Brief of Appellant at p. 10. As the Klamath Court observed, communications with sources outside an agency qualify for protection under the deliberative process privilege when they are received by the agency " 'to assist it in the performance of *its own* functions.' " Klamath, 532 U.S. at 10 (emphasis added). In the instant case, as the declarations reflect, the communications from the non-agency attorneys were received by the agency in order for it to perform its functions related to the implementation of the President's Military Order.

B. The Protected Records Were "Inter-Agency or Intra-Agency Memorandums Or Letters" between Government Employees and Unpaid Attorney Consultants.

The records at issue in this case were agency records of communications between DoD officials and outside attorney consultants as part of the deliberative process in the formulation of the military instructions and were solicited by the agency.[4]

As explained in the Declarations of Christine Ricci, Paul W. Cobb, Jr., and Karen L. Hecker, all DoD officials, when creating the Military Commission procedures, the General Counsel of the Department of Defense sought the opinions and recommendations of several distinguished advisors and former high ranking government officials during the deliberative process. See Ricci Decl., R. 38, Att. 1 at ¶¶ 13-14, JA 83-85; Cobb Decl., R. 36, Ex. 12 at ¶ 6, JA 72-73; Hecker Decl., R. 45, Att. 4 at ¶ 4, JA 115.

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[4] This Court has recognized that lawyers, as well as doctors and other expert advisers, can serve as consultants. Public Citizen, Inc. v. Dept. of Justice, 111 F.3d 168, 171 (D.C. Cir 1997).

As stated by Ms. Hecker, "[t]he General Counsel's intent has been to maintain a relationship with these lawyers to benefit from their extensive experience and wisdom." Id. The Department of Defense's FOIA Guide contemplates the use of individual consultants (such as the individuals consulted here) and that they would be protected as part of the deliberative process. See R. 45, Attachment 5 at p. 36 (Excerpt from the DoD 5400.7-R, DoD FOIA Program, September 1998 at § C3.2.1.5.1.2); Addendum at 3. The DoD could not have benefitted from the particular expertise of the individuals – who have hundreds of years of government service and expertise in military justice, law, and international relations – without consulting these outside experts.

C. Appellant's Representations that the Non-Agency Attorneys Were Simply "Private Citizens" or "Members of the Public" and Not Consultants whose Communications with DoD are Protected by Exemption (b)(5) Must Fail.

1. Appellant Mischaracterizes the Non-Agency Attorney Consultants as Simply Private Citizens With No Special Status in the Process.

Appellant's entire appeal rests on its assumption that the named non-agency attorneys were not consultants to the agency, but simply "members of the public" or "private citizens." See Appellant's Issue Presented for Review, Appellant's Brief at p. 1; Appellant's Statement of the Case, id. at p. 2; Appellant's Statement of Facts, id. at pp. 3, 6; Appellant's Summary of Argument, id. at p. 7; Appellant's Argument, id. at pp. 8, 10, 12, 13, 20, 21 and n. 3. Appellant urges that "[t]he plain statutory text of Exemption 5, which provides that documents may be protected from public disclosure only if they are 'inter-agency or intra-agency' records, simply cannot on its face be construed to encompass communications between government personnel and *volunteer private citizens*." Brief of Appellant at 7 (emphasis supplied). But these individuals are not simply volunteer private citizens in the context of this litigation.

Appellant ignores the evidence that establishes the necessary relationship of these individuals to the DoD in the deliberative process. That evidence is detailed in declarations of Ms. Ricci, Ms. Hecker and Mr. Cobb, who explain that the named individuals were selected by the General Counsel of DoD because of their backgrounds and distinguished careers to consult with DoD officials in the implementation of the President's Military Order relating to the Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism. Ricci Decl., JA 82-88, Hecker Decl., JA 115, Cobb Decl., JA 72-73. The General Counsel specifically asked these individuals who were "distinguished advisors and former high ranking government officials to consult with him and other senior attorneys and officials of the Department [and provide their opinions and recommendations]. . . on matters relating to Military Commissions." Cobb Decl., R. 36, Ex. 12 at ¶ 6; JA 72-73. The General Counsel intended that the DoD would benefit from the extensive experience and wisdom of these individuals in the decision making process. Hecker Decl., R. 45, Att. 4 at ¶ 4; JA 115. They were "uniquely qualified" to provide advice" that was sought. Ricci Decl., R. 38, at ¶ 13; JA 84. For example, "one consultant was an Assistant Trial counsel at the Nuremberg International War Trials and, as such, possessed valuable insight and experience with prosecuting international war criminals that would have been helpful to DoD as it set out to design a system to prosecute enemy combatants." Id. at ¶ 14; JA 85. "Each was asked to provide their comments on the proposed Military Commission procedures. This advice played an integral function in the DoD's decision making process." Id. at ¶ 13; JA 84; see also JA 86. Each of them also expected that their communications would be confidential, "as reflected by the confidential markings many of them placed on their correspondence." Id. at ¶ 14; JA 86.

Appellant's own recitation of the facts leading up to its request establishes that the non-agency attorneys were not just "members of the public" or "private citizens." On page 3-4 of its brief, Appellant acknowledges that "Secretary Rumsfeld [at a March 21, 2002, news briefing] ... identified nine distinguished attorneys from private practice and academia [most of them former government officials or judicial officials of various types who], . . participated in the development of the military commission procedures 'without compensation because of their patriotism.'" Brief of Appellant at p. 4. Moreover, close scrutiny of Secretary Rumsfeld's briefing evidences that these non-agency attorneys were not just volunteer private citizens, *i.e.*, "[w]e reached out . . . to those people [and others who were] very important in the development of these procedures. . . ." R. 41, Ex. A, pp. 4-5 (Comments by General Counsel Haynes), JA 100; see also District Court's discussion at R. 52, Mem.Op., p. 28 & n. 12; JA 150.

In this case, the sworn declarations of record establish that the DoD General Counsel sought these individuals out because of their unique expertise. As this Court has recognized, "the government may have 'a special need for the opinions and recommendations of temporary consultants . . .'" Hoover v. Dep't of Interior, 611 F.2d 1132, 1138 (5th Cir. 1980). There is no need for a formal relationship between the agency and the consultants. Formaldehyde Institute v. Dep't of Health and Human Services, 889 F.2d at 1123 (criticizing the District Court for focusing on the absence of any formal relationship between the outside consultant and the agency in determining the applicability of Exemption 5). Moreover, the work of outside consultants or experts in the deliberative process is contemplated by the DoD FOIA guide. See R. 45, Attachment 5, Addendum at 3 & Texas v. I.C.C., 889 F.2d 59, 61 (5th Cir. 1989). Even though these private attorneys may have, "just volunteered," consulting experts do not have to be paid to

perform consulting work. Wu v. Nat'l Endowment for the Humanities, 460 F.2d 1030, 1032 (5th Cir. 1972).

2. The Language of Klamath Does Not Preclude The District Court's Decision Here.

Appellant relies on language in Klamath to suggest to this Court that its prior rulings are no longer viable. That language addresses the text of 5. U.S.C. § 552(b)(5), which refers to "inter-agency or intra-agency memorandums or letters." As Appellant points out, the Supreme Court in Klamath recognized the "apparent plainness of this text," and stressed the "'importanc[ce]' of the condition that to qualify for exemption 'the communication must be 'inter-agency or intra-agency.'" Brief of Appellant at p. 8 (citations omitted). However, Appellant also admits that the Supreme Court in Klamath never reached the question of "whether the plain language of the provision should exempt from disclosure *any* communications between government personnel and private parties." Id. at p. 11.

Without any support in the record except reference to Secretary Rumsfeld's statement, Appellant asserts that the non-agency attorneys in this case were solely "volunteer private citizens who were not acting in any governmentally-conferred capacity." See Brief of Appellant at 11-13 and 18. That argument is fatally flawed as Appellee's detailed declarations show otherwise. As described above, Appellee has established that the views of these non-agency attorneys were sought by the General Counsel because of their former and/or present status, and that the non-agency attorneys served as consultants with no personal interests to promote and provided their views in the formulation of agency instructions and other matters relating to the Military Commissions procedures. That is all that is required by Klamath. As noted above, this Court has observed that "it [is] entirely reasonable to deem the resulting document to be an 'intra-agency'

memorandum for purposes of determining the applicability of Exemption 5." Judicial Watch, Inc., v. Dep't of Energy, et al., 412 F.3d at 130 (*citing* Ryan v. Dep't of Justice, 617 F.2d 781, 790 (D.C. Cir. 1980).[5]

3. This Court's Rulings and Ryan and Other Pre-Klamath Decisions are Still Precedent in this Circuit.

Appellant argues that the Klamath decision raises doubts about this Court's rulings in Ryan v. Dep't of Justice, supra, and Public Citizen, Inc. v. Dep't of Justice, supra, and other Pre-Klamath decisions. See Brief of Appellant at pp. 13-19.[6] Appellant points to Lardner v. U.S. Dep't of Justice, 2005 WL 758267, *13-15 (D.D.C. March 31, 2005), to suggest that this Court may read the Klamath decision "as an instruction to narrow its view of 'intra-agency' communications" and reject or severely narrow its previous rulings in Ryan and Public Citizen. See Brief of Appellant at

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[5] Reliance by Appellant on U.S. Dep't of Justice v. Julian, 486 U.S. 18, n. 1 (1988) [Brief of Appellant at pp. 9-10, 12-13], is of little or no merit here. First Appellant relies on a dissent. Second, in Julian plaintiffs sought records under both the FOIA and and Federal Rule of Criminal Procedure 32(c), which provided for disclosure of portions of such records to the criminal defendant who was the subject of the report. 486 U.S. at 6. That case is easily distinguished from the instant case. The plaintiffs in Julian sought disclosure only to themselves, and the Supreme Court acceded to this disparate treatment of the plaintiffs in that case because the deliberative process privilege was vitiated only insofar as it barred the subject's access to portions of his or her own reports. 486 U.S. at 9 and 14. This is clearly not the case here. In any event, Justice Scalia's comments were simply dicta in a dissent.

[6] In Ryan, plaintiffs sought to receive copies of U.S. Senators' responses to a questionnaire from the Attorney General about judicial nominations. 617 F.2d at 784. This Court found that records submitted by outside consultants as part of the deliberative process could be deemed 'intra-agency' memorandums and thus denied the disclosure request. Id. at 790.

In Public Citizen, the documents at issue were communications between former Presidents and the National Archives and Records Administration and the Department of Justice concerning the maintenance of their presidential records. 111 F.3d at 169. This Court, relying on Ryan, found that these records between an agency and outside consultants qualified as 'intra-agency' for the purposes of Exemption 5 and that it is "irrelevant whether the author of the documents is a regular agency employee or a temporary consultant." Id. at 170 (internal quotations omitted).

pp. 13-15. In Lardner, the District Court ruled that letters of advice to the Pardon Attorney (regarding pardon requests between 1960 to 1989) from judges and special prosecutors were protected by the deliberative process privilege, notwithstanding the fact that the authors were not employees of an "agency." The District Court in the Lardner case concluded:

> The Supreme Court in Klamath expressly declined to overrule Ryan, and it is certainly not the province of this Court to do so. It may well be that the D.C. Circuit will read Klamath as an instruction to narrow its view of "intra-agency" communications. However, "district judges ... are obligated to follow controlling circuit precedent until either [the D.C. Circuit], sitting en banc, or the Supreme Court, overrule it." United States v. Torres, 115 F.3d 1033, 1035 (D.C.Cir.1997). Until that time, Ryan remains good law, and under Ryan, the recommendation letters [from judges and special prosecutors] at issue qualify as intra-agency documents and therefore were properly withheld under Exemption 5.

Id. at 14 (footnotes omitted).[7] Since the communications at issue in Lardner were written between 1960 and 1989, it is fair to surmise that the judges and special prosecutors, like the individuals consulted in the instant case, are no longer in their former positions. Yet, the District Court concluded that they filled the role of consulting experts whose communications were protected by the deliberative process privilege. Appellee urges this Court to do the same. Of additional note, the concerns expressed by Lardner Court in March 2005 were allayed by this Court in its June 2005 decision in Judicial Watch, Inc., v. Dep't of Energy, 412 F.3d at 130 (giving continued vitality to Ryan).

Appellant's view that the Ryan and Public Citizen cases represented a more expansive view of the Exemption 5 privilege than is dictated in Klamath, was considered by the District Court in

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[7]Another case since Klamath reaffirmed the role of outside consultants in the deliberative process as set forth in Ryan. See, e.g., Physician's Committee for Responsible Medicine v. NIH, 326 F. Supp.2d 19, 28 (D.D.C. 2004) (explaining that documents produced by outside consultants are intra-agency records when the documents play the same role in the agency's deliberative process as would documents prepared by the agency's own personnel).

its December 16, 2005, ruling. See R. 52, Mem.Op. at p. 27; JA 149. The District Court agreed that Appellant's view was arguably true based on the "private interest" noted in Klamath, *i.e.*, "because the Senators in Ryan and the former Presidents in Public Citizen were advocating positions which would likely benefit themselves." Id. However, as the District Court observed, ". . , the Supreme Court explicitly declined to overrule these rulings . . . and they remain good law . . ." Id. (citations omitted). In the instant case, private or self-interests of the consultants are not at issue. Indeed, there has been no suggestion in these proceedings that the non-agency attorneys had any personal interests whatsoever in the deliberative process for which their opinions and views were sought.

Appellant also argues that other cases relied on by the District Court, such as Formaldehyde Institute v. Dep't of Health and Human Services, supra, and Wu v. Nat'l Endowment for the Humanities, supra, are neither "controlling" nor "persuasive." Appellant's Brief, 16-19. In Formaldehyde (involving outside reviewers for journal articles) and Wu (involving outside experts in Chinese studies), Appellant suggests that there was a type of "governmentally conferred capacity" that is missing here. Brief of Appellant, pp. 17, 18. However, Appellee has presented uncontradicted evidence through sworn declarations that establishes a "governmentally conferred capacity." The non-agency attorneys were sought after by the General Counsel to provide opinions and recommendations because of their unique backgrounds. R. 38, Ricci Decl. ¶ 13, JA 84; R. 36, Cobb Decl. ¶ 6, JA 72; R. 45, Hecker Decl., JA 115. The documents were created in aid of the deliberative process. They were communications from individuals without private interests. Hence, they qualify for Exemption 5 protection. See Judicial Watch, Inc., v. Dep't of Energy, 412 F.3d at 130.

As the District Court found, relying on the declarations, "the views of non-agency practicing attorneys either challenging or confirming the views of DoD's internal attorneys and other personnel on a subject of vital importance to this nation would enhance the quality of the agency's decision making process and [are] consistent with the objectives of Exemption 5." R. 52, Mem.Op. at pp. 28-29; JA 150-151. Thus, the District Court properly concluded that the "documents containing the views of these non-agency attorneys qualify as intra-agency documents." Id. at 151.

D. There Are No Material Issues of Fact and, Hence, Summary Judgment in Favor of Appellee on All Issues Was Appropriate.

The District Court appropriately relied on extensively detailed declarations filed by Appellee, cited *infra*, to support the DoD withholding decisions. Appellant's attempts to contradict these statements are founded on nothing more than speculation. A review of Appellant's Statement of Material Facts Not In Dispute attached to its final Cross Motion for Summary Judgment, R. 41, reveals that Appellant provided a single averment that:

> Defendant has not carried its evidentiary burden of establishing that the withheld records are properly exempt from disclosure. See Declaration of Stewart F. Aly, Declaration of Christine S. Ricci, Declaration of Morton H. Halperin, and Declaration of Eugene R. Fidell.

Id. Appellant failed to mention that Appellee also filed the Declarations of Paul W. Cobb, Jr., R. 36, Ex.12, JA 70-74.

The individuals included former high level government officials and academic experts who were asked by the General Counsel of DoD, William J. Haynes, II, to consult with him and other senior attorneys and officials of DoD. Cobb Decl., R. 36, Ex. 12 at ¶ 6; JA 72. The General Counsel of DoD selected them because of their backgrounds and distinguished careers. Id. "This

was not a formal group, it did not conduct meetings on any regular basis, and the individuals who participated in it did not provide any recommendations collectively, only individually." Id. These non-agency attorneys commented on the orders and instructions for implementation of the President's Military Order and other subjects related to Military Commissions as well. Id. DoD received their comments on a continuing basis and in confidence and "there was an understanding that the contents of the consultations would not be released publicly." Id.; see also Hecker Decl. R. 45, Att. 4, ¶ 4; JA 115.

The District Court properly rejected Appellant's attempts to contradict these sworn statements and this Court should do the same.

IV. The District Court's Decision Neither Undermines the Purpose and and History of FOIA Nor Threatens its Transparency and Accountability.

In essence, Appellant's final argument is that this situation has created a "gaping undefined loophole for secret participation by members of the public in critical rule-making processes." Brief of Appellant at p. 21. As previously noted, this argument is fundamentally flawed because it rests on the premise that these individuals were "members of the public" without any acknowledgment of the facts about how they came to be involved in providing comments on the military commissions. Amicus Curiae similarly rests its claim on the individuals being "private citizens" (Brief at p. 13). Neither Appellant or Amicus Curiae make any effort to contest these facts or to explain why the General Counsel of DoD is not permitted to utilize the confidential assistance of outside consultants in this manner.

Furthermore, Appellant concedes that this case does not involve Administrative Procedure Act (APA) rulemaking, 5 U.S.C. §§ 533, 706 (2000). R. 52, Mem.Op. at p. 32, JA 154. As the District Court observed: "[t]here is no conflict between the APA's notice and comment

requirements and the objectives underlying Exemption 5 . . ." Id. "In fact,'military or foreign affairs function[s] of the United States' are exempt from notice and comment rulemaking." Id. (*citing* 5 U.S.C. § 533(a)). Appellant's argument is again premised on its assumption that the non-agency attorneys whose advice was sought are nothing more than private citizens. The record clearly shows otherwise.

V. Amicus Curiae Raises No Compelling Arguments Requiring Reversal of the District Court's Decision.

Amicus Curiae, the Constitution Project, argues that Exemption 5 should be narrowly construed in this case because it involves "processes [that] potentially violate constitutional rights." Brief of Amicus Curiae at p. 14. However, a similar argument was unavailing in Center for Nat'l Security Studies v. U.S. Dep't of Justice where this Court chose to defer to the executive rather than narrow the scope of a FOIA exemption [in that case Exemption 7(A)] because the case involved national security, which is "a uniquely executive purview." 331 F.3d 918, 926-27 (D.C. Cir. 2003). "[B]oth the Supreme Court and this Court have expressly recognized the propriety of deference to the executive in the context of FOIA claims which implicate national security." Id. at 927. This is particularly true when "terrorism or other special circumstances" might warrant "heightened deference to the judgments of the political branches." Id. at 939 (*citing* Zadvydas v. Davis, 533 U.S. 678, 696 (2001)). There is also a "reluctan[ce] to intrude upon the authority of the executive in military and national security affairs." Id. (*citing* Dep't of the Navy v. Egan, 484 U.S. 518 (1988)).

This case implicates the authority of the executive in military and national security matters as it involves the creation of military commissions that try suspected terrorists. Forcing disclosure of documents that fall under the deliberative process privilege would discourage open and frank

discussions of policy matters between government employees and consultants. This would hinder the Executive's ability to make the best decisions regarding national security in the future. Therefore Amicus Curiae is incorrect when it argues that this Court should err on the side of disclosure. Rather, this Court should give Exemption 5 "a meaningful reach and application" since this case involves matters of national security. Center for Nat'l Security Studies, 331 F.3d at 926.

Amicus Curiae also argues that the public was denied the opportunity to play a role in the creation of the military commission law. Brief of Amicus Curiae at pp. 8-12, 14. However, as the Declaration of Paul Cobb explains, in addition to the withheld communications of the non-agency attorneys, "[m]any more comments came from members of the public or organizations with an interest in these matters. . ." See R. 36, Ex. 12 at ¶ 7; JA 72. Further, as the information in the Declaration of Christine Ricci shows, there were more than 1000 pages of documents released to Appellant, either with no redactions or redactions to which Appellant did not object. See R. 38, Att. 1 at ¶¶ 5, 7, 9, 10; JA 77-80 and *Vaughn Index* at R. 36; JA 77, 79, 80.

Amicus Curiae also argues that it is necessary for this Court to rule against the government in order to maintain proper checks and balances. See Brief of Amicus Curiae at pp. 11-12. It cites to the concurring opinion of Justice Kennedy in Hamdan v. Rumsfeld, __ U.S. ___, 126 S.Ct. 2749, 2800 (2006), asserting that "there must be meaningful checks on the Executive's power to establish and govern the [Military] commissions." Brief of Amicus Curiae at p. 12. Hamdan involved a claim regarding the availability of habeas proceedings for Guantanamo Bay detainees in the federal court notwithstanding the Detainee Treatment Act of 2005, Pub.L. No. 109-148, 118 Stat 2680 (2005). It has no application to a FOIA exemption case.[8]

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[8]In Hamdan, the Supreme Court reversed this Court and held that the military commission convened by President Bush to try a suspected terrorist held in Guantanamo Bay lacked the

In FOIA litigation, this Court has recognized "the different roles underlying the constitutional separation of powers" and found that "[i]t is within the role of the executive to acquire and exercise the expertise of protecting national security." Center for Nat'l Security Studies v. U.S. Dep't of Justice, 331 F.3d at 932. This Court also found that "[i]t is not within the role of the courts to second-guess executive judgments made in furtherance of that branch's proper role." Id. Therefore, Amicus Curiae is incorrect in its assertion that disclosure is necessary for proper checks and balances. Instead, it is proper for this Court to defer to the executive and deny Appellant's request for disclosure.

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power to proceed because its structure and procedures violated the Uniform Code of Military Justice and the Geneva Conventions. 126 S.Ct. 2791-93. The Court found that the Detainee Treatment Act of 2005 was ambiguous with respect to the removal of jurisdiction over detainees' pending habeas actions and refused to dismiss Hamdan's habeas case for lack of jurisdiction. Id. at 2762, 2769. In response to Hamdan, Congress passed the Military Commissions Act of 2006, Pub.L. No. 109-366 (Oct. 17, 2006), which includes a provision stating that no court shall have jurisdiction to hear an application for habeas corpus filed by an alien detained as an enemy combatant.

VI. CONCLUSION

Appellee respectfully submits that the judgment of the District Court should be affirmed.

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ADDENDUM

INDEX TO ADDENDUM

FOIA EXEMPTION 5, 5 U.S.C, § 552(b)(5) provides as follows:

(b) This section does not apply to matters that are --

. . .

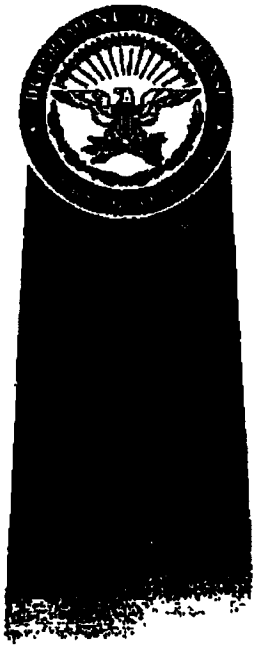
(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

. . .

DoD 5400.7-R

Department of Defense

DOD Freedom of Information Act Program



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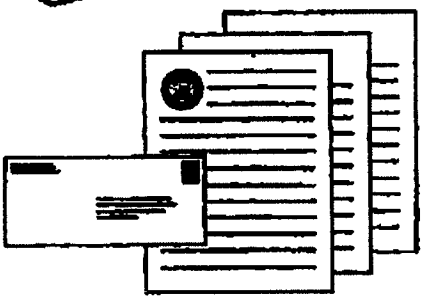

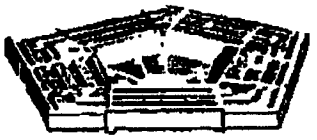

Directorate for Freedom of Information and Security Review

C3.2.1.5.1. Examples of the deliberative process include:

C3.2.1.5.1.1. The non-factual portions of staff papers, to include after-action reports, lessons learned, and situation reports containing staff evaluations, advice, opinions, or suggestions.

C3.2.1.5.1.2. Advice, suggestions, or evaluations prepared on behalf of the Department of Defense by individual consultants or by boards, committees, councils, groups, panels, conferences, commissions, task forces, or other similar groups that are formed for the purpose of obtaining advice and recommendations.

C3.2.1.5.1.3. Those non-factual portions of evaluations by DoD Component personnel of contractors and their products.

C3.2.1.5.1.4. Information of a speculative, tentative, or evaluative nature or such matters as proposed plans to procure, lease or otherwise acquire and dispose of materials, real estate, facilities or functions, when such information would provide undue or unfair competitive advantage to private personal interests or would impede legitimate Government functions.

C3.2.1.5.1.5. Trade secret or other confidential research development, or commercial information owned by the Government, where premature release is likely to affect the Government's negotiating position or other commercial interest.

C3.2.1.5.1.6. Those portions of official reports of inspection, reports of the Inspector Generals, audits, investigations, or surveys pertaining to safety, security, or the internal management, administration, or operation of one or more DoD Components, when these records have traditionally been treated by the courts as privileged against disclosure in litigation.

C3.2.1.5.1.7. Planning, programming, and budgetary information that is involved in the defense planning and resource allocation process.

C3.2.1.5.2. If any such intra- or inter-agency record or reasonably segregable portion of such record hypothetically would be made available routinely through the discovery process in the course of litigation with the Agency, then it should not be withheld under the FOIA. If, however, the information hypothetically would not be released at all, or would only be released in a particular case during civil

Federal Register

Friday,
November 16, 2001

Part IV

The President

Military Order of November 13, 2001—Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism

Federal Register
Vol. 66, No. 222
Friday, November 16, 2001

Presidential Documents

Title 3—

The President

Military Order of November 13, 2001

Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism

By the authority vested in me as President and as Commander in Chief of the Armed Forces of the United States by the Constitution and the laws of the United States of America, including the Authorization for Use of Military Force Joint Resolution (Public Law 107–40, 115 Stat. 224) and sections 821 and 836 of title 10, United States Code, it is hereby ordered as follows:

Section 1. *Findings.*

(a) International terrorists, including members of al Qaida, have carried out attacks on United States diplomatic and military personnel and facilities abroad and on citizens and property within the United States on a scale that has created a state of armed conflict that requires the use of the United States Armed Forces.

(b) In light of grave acts of terrorism and threats of terrorism, including the terrorist attacks on September 11, 2001, on the headquarters of the United States Department of Defense in the national capital region, on the World Trade Center in New York, and on civilian aircraft such as in Pennsylvania, I proclaimed a national emergency on September 14, 2001 (Proc. 7463, Declaration of National Emergency by Reason of Certain Terrorist Attacks).

(c) Individuals acting alone and in concert involved in international terrorism possess both the capability and the intention to undertake further terrorist attacks against the United States that, if not detected and prevented, will cause mass deaths, mass injuries, and massive destruction of property, and may place at risk the continuity of the operations of the United States Government.

(d) The ability of the United States to protect the United States and its citizens, and to help its allies and other cooperating nations protect their nations and their citizens, from such further terrorist attacks depends in significant part upon using the United States Armed Forces to identify terrorists and those who support them, to disrupt their activities, and to eliminate their ability to conduct or support such attacks.

(e) To protect the United States and its citizens, and for the effective conduct of military operations and prevention of terrorist attacks, it is necessary for individuals subject to this order pursuant to section 2 hereof to be detained, and, when tried, to be tried for violations of the laws of war and other applicable laws by military tribunals.

(f) Given the danger to the safety of the United States and the nature of international terrorism, and to the extent provided by and under this order, I find consistent with section 836 of title 10, United States Code, that it is not practicable to apply in military commissions under this order the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts.

(g) Having fully considered the magnitude of the potential deaths, injuries, and property destruction that would result from potential acts of terrorism against the United States, and the probability that such acts will occur, I have determined that an extraordinary emergency exists for national defense

purposes, that this emergency constitutes an urgent and compelling government interest, and that issuance of this order is necessary to meet the emergency.

Sec. 2. *Definition and Policy.*

(a) The term "individual subject to this order" shall mean any individual who is not a United States citizen with respect to whom I determine from time to time in writing that:

(1) there is reason to believe that such individual, at the relevant times,

(i) is or was a member of the organization known as al Qaida;

(ii) has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefor, that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy; or

(iii) has knowingly harbored one or more individuals described in subparagraphs (i) or (ii) of subsection 2(a)(1) of this order; and

(2) it is in the interest of the United States that such individual be subject to this order.

(b) It is the policy of the United States that the Secretary of Defense shall take all necessary measures to ensure that any individual subject to this order is detained in accordance with section 3, and, if the individual is to be tried, that such individual is tried only in accordance with section 4.

(c) It is further the policy of the United States that any individual subject to this order who is not already under the control of the Secretary of Defense but who is under the control of any other officer or agent of the United States or any State shall, upon delivery of a copy of such written determination to such officer or agent, forthwith be placed under the control of the Secretary of Defense.

Sec. 3. *Detention Authority of the Secretary of Defense.* Any individual subject to this order shall be —

(a) detained at an appropriate location designated by the Secretary of Defense outside or within the United States;

(b) treated humanely, without any adverse distinction based on race, color, religion, gender, birth, wealth, or any similar criteria;

(c) afforded adequate food, drinking water, shelter, clothing, and medical treatment;

(d) allowed the free exercise of religion consistent with the requirements of such detention; and

(e) detained in accordance with such other conditions as the Secretary of Defense may prescribe.

Sec. 4. *Authority of the Secretary of Defense Regarding Trials of Individuals Subject to this Order.*

(a) Any individual subject to this order shall, when tried, be tried by military commission for any and all offenses triable by military commission that such individual is alleged to have committed, and may be punished in accordance with the penalties provided under applicable law, including life imprisonment or death.

(b) As a military function and in light of the findings in section 1, including subsection (f) thereof, the Secretary of Defense shall issue such orders and regulations, including orders for the appointment of one or more military commissions, as may be necessary to carry out subsection (a) of this section.

(c) Orders and regulations issued under subsection (b) of this section shall include, but not be limited to, rules for the conduct of the proceedings of military commissions, including pretrial, trial, and post-trial procedures, modes of proof, issuance of process, and qualifications of attorneys, which shall at a minimum provide for—

(1) military commissions to sit at any time and any place, consistent with such guidance regarding time and place as the Secretary of Defense may provide;

(2) a full and fair trial, with the military commission sitting as the triers of both fact and law;

(3) admission of such evidence as would, in the opinion of the presiding officer of the military commission (or instead, if any other member of the commission so requests at the time the presiding officer renders that opinion, the opinion of the commission rendered at that time by a majority of the commission), have probative value to a reasonable person;

(4) in a manner consistent with the protection of information classified or classifiable under Executive Order 12958 of April 17, 1995, as amended, or any successor Executive Order, protected by statute or rule from unauthorized disclosure, or otherwise protected by law, (A) the handling of, admission into evidence of, and access to materials and information, and (B) the conduct, closure of, and access to proceedings;

(5) conduct of the prosecution by one or more attorneys designated by the Secretary of Defense and conduct of the defense by attorneys for the individual subject to this order;

(6) conviction only upon the concurrence of two-thirds of the members of the commission present at the time of the vote, a majority being present;

(7) sentencing only upon the concurrence of two-thirds of the members of the commission present at the time of the vote, a majority being present; and

(8) submission of the record of the trial, including any conviction or sentence, for review and final decision by me or by the Secretary of Defense if so designated by me for that purpose.

Sec. 5. *Obligation of Other Agencies to Assist the Secretary of Defense.*

Departments, agencies, entities, and officers of the United States shall, to the maximum extent permitted by law, provide to the Secretary of Defense such assistance as he may request to implement this order.

Sec. 6. *Additional Authorities of the Secretary of Defense.*

(a) As a military function and in light of the findings in section 1, the Secretary of Defense shall issue such orders and regulations as may be necessary to carry out any of the provisions of this order.

(b) The Secretary of Defense may perform any of his functions or duties, and may exercise any of the powers provided to him under this order (other than under section 4(c)(8) hereof) in accordance with section 113(d) of title 10, United States Code.

Sec. 7. *Relationship to Other Law and Forums.*

(a) Nothing in this order shall be construed to—

(1) authorize the disclosure of state secrets to any person not otherwise authorized to have access to them;

(2) limit the authority of the President as Commander in Chief of the Armed Forces or the power of the President to grant reprieves and pardons; or

(3) limit the lawful authority of the Secretary of Defense, any military commander, or any other officer or agent of the United States or of any State to detain or try any person who is not an individual subject to this order.

(b) With respect to any individual subject to this order—

(1) military tribunals shall have exclusive jurisdiction with respect to offenses by the individual; and

(2) the individual shall not be privileged to seek any remedy or maintain any proceeding, directly or indirectly, or to have any such remedy or

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 29th day of August 2007, a true and correct copy of the foregoing **Appellee's Brief** was served by first-class mail, postage prepaid on:

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